



# Employment Law Bulletin

June 2018

## California Supreme Court Limits Ability to Classify Workers as Independent Contractors in Claims Brought Under the Wage Orders.

On April 30, 2018, the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, dramatically changed the landscape for companies that hire independent contractors by expanding the definition of "employ" and creating a presumption that all workers are *employees* in claims brought under the California Wage Orders. The Supreme Court held that in such cases, a worker is an *employee* if the relationship with the hiring party falls under one of the following: the hiring party (1) exercises control over wages, hours, or working conditions, (2) causes the worker to suffer or permits the worker to work; or (3) engages the employee, creating a common law employment relationship. In order to limit the broad application of the second definition (to suffer or permit to work), the court adopted the "ABC" test, which requires the hiring party to prove all of the following in order to overcome the presumption that the worker is an employee and prove an independent contractor relationship:

(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

AND

(B) the worker performs work that is outside the usual course of the hiring entity's business;

AND

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring party.

If the hiring party cannot establish all three of these prerequisites, the worker is an *employee* covered by the following Wage Order's protections:

- minimum wage
- maximum hours of work (overtime, double time, 7<sup>th</sup> consecutive days)
- rest breaks
- meal breaks
- timekeeping/record keeping
- itemized wage statements (pay stubs)
- child labor laws
- uniforms and equipment

In addition to complying with the Wage Orders that offer the protections (and prescribe the penalties) listed above, employers must pay Social Security, payroll, unemployment and state taxes in addition to providing worker's compensation insurance and paid sick leave. While it might be tempting to avoid these obligations by classifying a worker as an independent contractor, misclassification of a worker who is by the *Dynamex* standard an "employee" can result in serious exposure to significant wage claims, penalties and damages.

If you have workers you currently classify as independent contractors, we recommend that you review your arrangement under the ABC test to make sure your relationship is properly classified. Please do not hesitate to contact us for assistance with this evaluation.

### **Final Pay Penalties: Up to 30 Days of Wages Awarded, Even for Negligent Mistakes**

In *Diaz v. Grill Concepts Services, Inc.*, a California Court of Appeal recently held that an employer's negligent mistake in making final pay is not a defense to final pay penalties. The court further ruled that a judge does not have discretion to lower the penalty based on the employer's "innocent" mistake or lack of awareness of its final pay obligations. Given these harsh rules, employers must be well versed in the final pay rules and the potential penalties imposed for violating them. Here's a refresher:

- California employees are entitled to receive their final pay for all hours worked and accrued vacation/PTO balances when their employment ends.
- If the employee is terminated, laid off, or quits with at least 72 hours' notice, final pay (including accrued vacation/PTO) must be delivered on the employee's last day of employment.
- If the employee quits with less than 72 hours' notice, final pay is due within 72 hours of the notice.
- Labor Code section 203 provides that when timely final pay is not made, the employee's wages shall continue as a penalty, up to a maximum of 30 days (the equivalent of six weeks of pay). These penalties are commonly referred to as "waiting time" penalties and they are recoverable by an employee who files a lawsuit in court or a claim with the California Labor Commissioner.
- Waiting time penalties are equal to one day of wages for every day the employee waits for payment, up to a maximum of 30 days. For the employee earning just \$11/hour, the waiting time penalties can be as high as \$2,640 (\$11/hour x 8 hours x 30 days) – regardless of the amount of final wages owed.

Even employers who know the final pay rules often innocently make mistakes. Here are a few we often see that result in final pay penalties:

- Terminating an employee mid-pay period without the ability to prepare the payroll check in-house;
- Mailing address errors – transposed numbers, sending checks to employee's previous address;
- A "no show" employee is deemed to have resigned, but the check isn't sent within 72 hours of that determination;
- An employee's final wages are sent via overnight delivery with a signature required – if the employee isn't home to receive the mail, final pay is delayed (we recommend that you use Federal Express without signature – the delivery will be on time and FedEx tracking records will prove delivery);
- An employee's final wages are sent via certified mail with return receipt requested – again, if the employee isn't home to sign for the mail, final pay is delayed; and
- Failure of supervisors to timely communicate a voluntary quit to HR or payroll

The *Diaz* case reflects the important public policy in favor of timely payment of wages to employees. If you have questions about your obligations, please contact an employment attorney at SMT.

## **No Se Habla Español?**

SMT's employment attorneys can provide your company with employment policies, forms and employee disciplinary documentation in Spanish. Providing such important information to employees in the language they understand is critical to employee performance, providing a welcoming diverse work environment, and protecting your company against employment claims. Contact an SMT attorney today to get started.

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